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NO. 82-6915

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

CHARLES WILLIAM BASS,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CORRECTLY APPLIED WAINWRIGHT V. SYKES AND ENGLE V. ISAAC IN HOLDING THAT PETITIONER'S CLEAR PROCEDURAL DEFAULT UNDER STATE LAW BARRED FEDERAL HABEAS CORPUS REVIEW OF HIS CLAIM THAT A VENIREMAN WAS ERRONEOUSLY EXCLUDED.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, by and through his attorney, the Attorney General of Texas, and files this his brief in opposition.

OPINION BELOW

The opinion of the court below in Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983) and the opinion of that court in denying Petitioner's motion for rehearing are appended to Petitioner's petition at Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on February 4, 1983. Petitioner's timely filed motion for rehearing was denied on May

19, 1983. Petitioner seeks to invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner's statement of the case essentially is correct.

SUMMARY OF ARGUMENT

This case presents only the application of the well settled federal habeas doctrine of waiver to the particular facts in this case. State law effective at the time of Petitioner's trial required that he voice an objection to the allegedly erroneous exclusion of a venireman pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). His failure to do so precludes federal habeas review of this claim, absent a showing of cause and prejudice.

The alleged futility of making such objection before the state courts is insufficient to establish "cause." Thus, the Court of Appeals correctly held that this claim was waived in federal habeas review.

Petitioner's assertion that recent state law would excuse his procedural default is based upon a misreading of that law, as the Court of Appeals found in denying his petition for rehearing. Finally, that the state courts occasionally overlook a procedural default does not support Petitioner's argument that the default must be excused in his case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. Further, this case only presents the application of well settled law of procedural default to the particular facts involved in this case. Thus, this Court should decline to review this case.

II.

THE COURT BELOW CORRECTLY APPLIED WAINWRIGHT V. SYKES AND ENGLE V. ISAAC IN HOLDING THAT PETITIONER'S CLEAR PROCEDURAL DEFAULT PURSUANT TO STATE LAW BARRED FEDERAL HABEAS REVIEW OF HIS CLAIM

The Court of Appeals found that Petitioner's failure to voice any objection to the exclusion of venireman Marian Hall from his 1980 capital murder trial barred federal habeas review of that ground pursuant to Wainwright v. Sykes, 433 U.S. 71 (1977) and Engle v. Isaac, 456 U.S. 107 (1982). That court held:

> It is settled law that such a state prisoner as Bass, barred by procedural default from raising a constitutional claim on direct appeal, cannot do so in a federal habeas proceeding without demonstrating both cause for the default and actual prejudice resulting from it. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Texas procedure requires a contemporaneous objection to the exclusion of a veniremen on pain of waiver of the point. Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977). None was made by Bass to the dismissal of Mrs. Hall from the venire.
>
> * * *
>
> Sykes and Engle, however, recognize that waiver can be avoided by a showing of "cause" and "prejudice"; and Bass argues that "cause" existed in his case. This is said to be so because at the time of his trial the state court system of Texas failed properly to understand and apply Witherspoon and hence any objection would have been meaningless. A very similar suggestion was, however, squarely rejected in Engle. Witherspoon v. Illinois, decided in 1968, long antedated petitioner's trial in 1980, so that the

> basis of the contentions successfully made in Adams v. Texas, 448 U.S. 38, 39, 100 S.Ct. 2521, 2523, 65 L.Ed.2d 581 (1980) -- the same contentions that counsel alludes to here -- was apparent and available. Petitioner's contention to us therefore goes down before the specific language of Engle:
>
> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.
>
> 456 U.S. at 134, 102 S.Ct. at 1574, 71 L.Ed.2d at 804.
>
> We hold that petitioner's Witherspoon objection to the discharge of Mrs. Hall was waived. An objection to the discharge of a venireman is little to require; to hold otherwise would open the discharge of every venireman, objected to or not, in such cases as this -- where the venire examination consumed over two-thirds of the 3000-page record -- to examination on appeal. We cannot countenance such ambushing state processes.

696 F.2d at 1156-1158 (footnote omitted). That Court was correct in so holding.

In Wainwright v. Sykes, 433 U.S. 72 (1977) and Francis v. Henderson, 425 U.S. 536 (1976), this Court recognized the valid state interests in adopting procedural rules requiring defendants to make contemporaneous objections to objectionable matters at trial. Absent compliance with these state procedural requirements, federal habeas review is precluded. In Davis v. United States, 411 U.S. 233 (1973), this Court held that absent a requirement that the parties make contemporaneous objections in order to preserve error, they would have little incentive to make such objection and:

> [s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thoughts that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at the time when representation might well be difficult.

411 U.S. at 241. See also, Estelle v. Williams, 425 U.S. 501 (1976). This is especially true where, as here, the asserted error involves jury selection proceedings where there are a

multitude of tactical and strategic reasons why counsel specifically would not want to object to the exclusion of a prospective juror. Jury selection, unlike many other trial proceedings, is solely a matter of trial tactics and strategy, involving decisions of counsel which cannot be second-guessed years later in federal habeas proceedings.

Petitioner seeks to circumvent the requirement of Wainwright v. Sykes, however, by asserting that an objection to the exclusion of the venireman would have been "futile" under state law.

In Engle v. Isaac, supra, this Court held that in federal habeas review, the futility of the state defendant raising an objection before the state courts cannot constitute "cause" for the failure to object. In Isaac, the state defendants pursuing federal habeas corpus relief had failed to voice objections, as required by state procedural law, to erroneous jury instructions. They sought to excuse their failure to object, by arguing that (1) at the time of their trials, the defects in the jury instructions had not been established, and (2) the state courts consistently had rejected such attacks upon the same jury instructions, so that any objections made would have been futile gestures.

In holding that these arguments were insufficient to establish "cause" for the failure to object under the test of Wainwright v. Sykes, this Court stated:

> . . .the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

456 U.S. at 130.

The habeas petitioner then urged this Court to find that, because the defects in the state jury instructions had not yet been established at the time of their trials, this excused their

failure to object. This argument was rejected also, however, because the "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair." 456 U.S. at 131. This Court found that the claims raised by the habeas petitioners had been the subject of federal constitutional litigation both in federal and state courts, and held that:

> [i]n light of this activity, we cannot say that respondents [the habeas petitioners] lacked the tools to construct their constitutional claim. . . Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness or the objection as cause for a procedural default.

456 U.S. at 133-34. (emphasis added)(footnotes omitted).

Thus, that the state court may have been hostile to the argument cannot excuse the procedural default under Wainwright v. Sykes, so long as the defendant has available to him the "tools" to construct the constitutional claim. This, Petitioner certainly had in May, 1980. See, Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc, 626 F.2d 396 (1980). Thus, the instant case clearly falls within the ambit of Sykes and Isaac. The court below was correct in holding that Petitioner's failure to object to the exclusion of venireman Hall precludes federal habeas review in the district court.

Additionally, Petitioner asserts that because sometimes the state appellate court will excuse a procedural default and reach the merits of a claim not objected to at trial, federal habeas courts should decline to enforce the state's contemporaneous objection requirement in all circumstances. Such a proposition

recently was rejected by the court below in Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), wherein that court noted:

> . . . we do not mean to suggest that past excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to [state] law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979).

686 F.2d at 314. Accord, Engle v. Isaac, 456 U.S. at 135, n.44. Thus, that the state court on occasion has overlooked a procedural default provides no support for Petitioner's argument in the instant case, where it did not. Petitioner's assertion that the holding of the court below is inconsistent with Barr v. City of Columbia, 378 U.S. 146 (1964) must fail for two reasons. First, the opinion of the state appellate court did not, as Petitioner asserts, ignore its own procedural default rules. See, Bass v. State, 662 S.W.2d at 109. Second, the authority upon which Petitioner relies was decided well before Sykes and Isaac, and, therefore, to any extent in which these cases are inconsistent with Barr, that language in Barr must be considered overruled.

Finally, Petitioner's arguments that the state modified its contemporaneous objection rule to the extent that his procedural default now would be "excused" wholly misconstrues existing state law. The court below correctly held:

> The decisions relied on by Bass do not go so far as he would like. Examination of them makes plain that their rule is a narrower one: that such a mere general objection or exception to the dismissal of a juror as would normally be deemed under Texas law to present nothing for review will be deemed sufficient in instances occurring before the handing down of Adams, not that no objection whatever is required. In each of the three decisions an objection of some sort was made, and in each the rule as stated was applied.
>
> * * *
>
> We therefore conclude that the Texas rule, while excusing the generality of an objection in such circumstances as these, requires some

> expression of dissent, however vague, from the dismissal of a juror before it may be complained of on appeal.

705 F.2d at 122 (footnote omitted). Petitioner's argument is meritless.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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